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Issue date: 26Jul2002

Case No.: 2001-LHC-2406

OWCP No.: 07-151096

In the Matter of:

BILL D. EZELL,
Claimant

v.

INGALLS SHIPBUILDING, INC.
Employer

APPEARANCES:

D. JASON EMBRY,
On Behalf of the Claimant

PAUL M. FRANKE, JR.,
On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act"). The claim is brought by Bill Ezell, Claimant, against his former employer, Ingalls Shipbuilding, Respondent. Claimant asserts that he sustained a back injury during his employment, which disabled him and necessitated an early medical retirement. A hearing was held on January 31, 2002 in Gulfport, Mississippi, at which time the parties were given the

opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

1) Claimant's Exhibits Nos. 1-10[1]; and

2) Respondent's Exhibits Nos. 1-28.

Upon conclusion of the hearing, the record remained open for a deposition and the submission of post-hearing briefs, which were timely received. This decision is being rendered after giving full consideration to the entire record.[2]

STIPULATIONS[3]

The Court finds sufficient evidence to support the following stipulations:

1) An injury or accident occurred on November 10, 1998 to Claimant's back;

2) The injury occurred in the course and scope of Claimant's employment;

3) Jurisdiction is not disputed;

4) An employer/employee relationship existed at the time of the accident;

5) Employer was timely notified of the injury;

6) A timely Notice of Controversion was filed;

7) Claimant's average weekly wage was $581.45;

8) Compensation has been paid as follows:
Temporary Total Disability – November 14, 1998 through November 15, 1998
December 8, 1998 through October 4, 1999
The total compensation paid to date is: $16,778.84
The total of the medicals expenses paid to date is: $27,198.40; and

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[1]CX-10, containing the deposition transcript of Dr. Terry Smith, was submitted post-hearing without objection.

[2]The following abbreviations will be used in citations to the record: CTX- Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

[3]CTX-1

9) Claimant's date of Maximum Medical Improvement is September 28, 1999.

ISSUES

The unresolved issues in these proceedings are:

(1) Nature and Extent of Disability;

(2) Unauthorized medical treatment by Dr. Broussard;

(3) Entitlement to Section 8(f) relief;

(4) Credit for Compensation; and

(5) Attorney's Fees

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Bill Ezell

Bill Ezell, Claimant, testified that he is sixty-four years old and has worked in many trades, including working in the lumber business, in sales, and as a truck driver. Claimant was hired at Respondent's facility as a sheet metal helper in January, 1974, where he worked for five years. After his employment at Respondents, Claimant worked as a roustabout, delivery van driver, and was employed by U-Haul. He returned to work in the sheet metal department at Respondent's facility in May, 1985. TR. pp. 20-24.

On November 10, 1998, Claimant was loading a piece of steel angle at Respondent's facility and stepped on a small piece of angle, which twisted his foot and caused him to twist his back. Claimant reported to Dr. Warfield at the Respondent's hospital and was diagnosed with a pulled muscle or muscle strain. He was taken off of work until November 15, 1998. Claimant stated that he attempted to return to work at that time, but had continued pain. TR. pp. 29-32.

Dr. Curtis Broussard, Claimant's family physician, ordered an MRI, which was performed on December 3, 1998. This MRI revealed a multi-level lumbar stenosis and a herniated disc at L3-4 on the left. Claimant was pulled from work on December 7, 1998. Dr. Broussard referred Claimant to Dr. Terry Smith for a surgical evaluation. Since Claimant did not wish to undergo surgery at that time, he was referred to Dr. Kent T. Overmyer for pain management. RX-27.

After his pain management, therapy, and injection treatments were unsuccessful, Claimant underwent a lumbar microdiscectomy, performed by Dr. Terry Smith, on April 12, 1999. A

functional capacity evaluation was performed after his recovery. Based on the FCE results, Dr. Smith assigned a maximum improvement date of September 28, 1999 and released Claimant to work with restrictions on October 4, 1999. RX-27.

On October 5, 1999, Claimant returned to work at Respondents in a modified light-duty position under the supervision of Mr. Don Farris, shop foreman, and Mr. R.D. Mann, supervisor. At that time, Claimant stated that he informed Respondent's physician that he was taking Lortabs, which would make him ineligible to work. However, the physician assigned him to work anyway. While employed, he was required to walk a mile each day to and from the parking lot using a cane. This new position required him to work in the sheet metal department with insulation. His job duties included him lifting approximately thirty-five to forty pounds. Claimant stated that the most difficult duties for this position were the constant bending and standing on his feet. He added that he was allowed to sit down and alternate his positions. TR. pp. 30-35.

Claimant testified at the hearing that he had to use his vacation time during his three weeks at this modified employment position due to his back pain. TR. pp. 35-39.

Claimant stated that on October 18, 1999 he came home from work and realized that he had a blister on his foot, which he could not feel. He returned to Dr. Broussard on October 19, 1999. Claimant testified that Dr. Broussard recommended that he be medically retired. Claimant retired from Respondent's employment and returned to work at the Isle of Capri, where he had previously been employed as a shuttle bus driver during his layoffs. Claimant testified that he worked in this position for approximately six weeks, until July 17, 2000. He stated that he has not worked since then, because of his back pain. TR. pp. 39-46.

Claimant testified that he has sustained several traumatic injuries in the past, including an injury to his triceps, right forefinger, and he has undergone a knee replacement, and cervical surgery. He denied being diagnosed with carpal tunnel syndrome. As to his disability ratings, he was assigned a 20% permanent disability for the 1989 injury to his neck, a 15% rating for his injured finger, and a 50% disability rating for his knee. TR. pp. 25-28, 65-68; RX-27.

II. MEDICAL EVIDENCE

1. Depositions

Terry Smith, M.D.[4]

Dr. Terry Smith, a neurosurgeon, examined Claimant on January 9, 1999. A physical

[4]The records of Dr. Terry Smith are reproduced as CX-5 and EX-16. These records will be cited to the extent they differ from or add to Dr. Smith's testimony.

examination revealed that he had normal strength, normal tendon reflexes, except for the knee, and decreased sensation on the outer aspect of his leg and foot. He observed a herniated disc on Claimant's MRI and ordered conservative treatment in the form of physical therapy. This physical therapy was unsuccessful, so Dr. Smith next tried injections. These were also unsuccessful, so Claimant opted for surgery. Dr. Smith performed the surgery to correct the disc herniation, and opined that Claimant recovered very well. CX-10, pp. 1-5.

Dr. Smith saw Claimant on several occasions after the surgery for additional complaints of pain and swelling in his back and hips. He added that Claimant's MRI results, post-surgery, were normal, indicating that the surgery was successful. At that point, he ordered a functional capacities evaluation. Dr. Smith added that he released Claimant back to work in September, 1999, after obtaining the results of the testing. He assigned Claimant a maximum medical improvement date of September 28, 1999 and a 10% impairment rating. At this time, Claimant indicated that he was not ready to retire and wanted to work. Claimant did return to work, but later visited Dr. Smith and requested that he write a recommendation for medical retirement. At that time, Dr. Smith did so because he thought that medical retirement would be reasonable, given Claimant's age. However, Dr. Smith opined that Claimant's modified job at Respondent's facility was well within Claimant's work restrictions, and Claimant chose not to continue in the position. CX-10, pp. 5-12; RX-16, p. 5.

Dr. Smith also opined that Claimant's work injury to his back combined with his pre-existing disabilities, resulting in a greater percentage of total body impairment. CX-10, pp. 5-11; RX-16, p. 2.

2. Records

Thomas F. Hewes, M.D.

Dr. Thomas Hewes first examined Claimant on April 20, 1987 for an injury to his right knee and ankle. X-rays indicated degenerative changes in the area. Dr. Hewes ordered an arthroscopy procedure, which was performed in July, 1987. He assigned a 15% impairment to the right knee. In 1989, Dr. Hewes

noted that degenerative changes in the knee would probably prevent Claimant from doing frequent climbing, but that he could return to work. RX-21.

William Seidensticker, M.D.

Claimant was evaluated by Dr. Seidensticker in 1994 for problems with his right knee. Claimant's right knee problems eventually required a total arthroplasty, knee replacement procedure, which was performed in July, 1995. This required Claimant to be taken off work and undergo a work-hardening therapy program. Claimant's knee healed, and as of August 19, 1997, his gait was normal with full extension. RX-17.

Claimant returned to see Dr. Seidensticker in July, 1999 as a referral from Dr. Terry Smith. His main complaint was hip pain. A physical examination revealed full range of motion in the hips with some pain on straight leg raising. X-rays of the pelvis revealed no abnormality in the hip area. Dr. Seidensticker opined that Claimant might have an inflammatory process, diminishing some of his internal hip motion, but that he had no significant joint disease. RX-17.

Charles J. Winters, M.D.

Claimant was examined by Dr. Charles Winters in 1995, for a second opinion, regarding a work-related injury to his right knee. Dr. Winters noted that Claimant had previously injured his knee, requiring the removal of some cartilage. He opined that Claimant's aggravation of his pre-existing knee problem was work-related and recommended a total knee replacement. RX-19.

Harry Danielson, M.D.

Dr. Harry Danielson examined Claimant in 1989 for a suspected herniated disc in the cervical area. In April, 1989, Dr. Danielson noted that Claimant underwent an anterior fusion at C3-4 with an interbody bone graft. Claimant was taken off of work for recovery and therapy treatment. RX-22.

Kent T. Overmyer, M.D.

Dr. Overmyer, who practices at Coastal Chronic Pain Services, PLLC, first saw Claimant on February 17, 1999 for complaints of back and leg pain. He opined, from Claimant's MRI and other medical records, that Claimant suffered from lumbar radiculopathy and myofascial pain. Dr. Overmyer noted that a treatment of lumbar epidural steroid injections and trigger point injections would help with pain and muscle spasms. Claimant reported back to the office on March 8, 1999, noting only minimal improvement from the injection. RX-18.

Curtis Broussard, M.D. General Practitioner

Progress notes from Dr. Broussard's office indicate that Claimant was seen on December 7, 1998 complaining of low back pain and leg numbness, stemming from an incident at work. A subsequent MRI was interpreted as showing degenerative disc disease and spinal spondylosis at several levels. Dr. Broussard referred Claimant to Dr. Terry Smith for further evaluation. CX-4, pp. 8-16; RX-20.

Dr. Broussard also saw Claimant on several occasions after the surgery in his lower lumbar area. Claimant complained of constant and worsening back pain. On October 1, 1999, Dr. Broussard's progress notes indicate that Claimant felt he was incapable of working at Respondents, and should be retired. He saw Claimant again on October 19, 1999, at which time he noted that Claimant should be medically retired. Claimant continued to see Dr. Broussard complaining of pain

and bilateral leg numbness through April 21, 2000. CX-4, pp. 1-16; RX-20.

III. VOCATIONAL EVIDENCE

1. Physical Therapy Center of Ocean Springs

Claimant underwent a functional capacities evaluation (FCE) on September 7, 1999 at the request of Dr. Terry Smith. He was evaluated for six hours over a period of two days. The administrator reported that Claimant gave maximum effort with no evidence of symptom magnification. During the test, Claimant performed several activities, including material handling, squatting, standing, and lifting. He demonstrated limitations in movement on each of these activities. CX-5; CX-6; RX-25.

2. Joe Walker, C.R.C.
Walker and Associates

Mr. Joe Walker, a rehabilitation specialist, met with Claimant after he returned to work in 1999, and prepared a vocational rehabilitation report regarding Claimant's employability. As of October 5, 1999, Claimant was engaged in a modified position at Respondent's facility with permanent work restrictions. These restrictions included primary lifting from the mid-thigh to shoulder level, avoiding lifting from the floor, performing no crawling or squatting, use of a walking cane as needed, limited climbing, limited bending, and limited lifting. His restrictions fell into the sedentary to light duty range. Mr. Walker noted that Claimant was not having any problems with his modified work activity, and he made no complaints of problems in performing this work. RX-23.

Mr. Walker met with Claimant personally on October 5, 1999, and Claimant indicated that he had not missed any days since processing back in at work and was able to perform his duties. He expressed satisfaction with his job. On October 12, 1999, however, Claimant reported that his back and leg pain "seemed to be getting worse with each day." Claimant also stated that he intended to transfer to a more

sedentary type of position with Respondent. Mr. Walker's report indicates that in the modified position at Respondents, Claimant was permitted great latitude in alternating his posture while working, such as standing sitting and periodically taking breaks. RX-23.

3. Tommy Sanders, C.R.C.
Sanders and Associates

Mr. Tommy Sanders, certified rehabilitation counselor, evaluated the modified position that Claimant performed with Respondent after his back surgery. He met with Claimant's foreman and his supervisor. After evaluating the work requirements of the position, he opined that the modified position with Respondent was consistent with Claimant's permanent work restrictions. RX-24.

Mr. Sanders also conducted a labor market survey dated December 14, 1999. The following positions were listed as both suitable and available for Claimant given his permanent work restrictions and experience:

1. Full-time Night Auditor for Motel 6 – the job requires occasional standing/walking with frequent sitting/handling. The wages are $5.50 per hour with on-the-job training;
2. Full-time Night Auditor for Days Inn – the job requires activities similar to the Motel 6 position and pays $5.75 per hour; and
3. Full-time Customer Service Representative for Avis Rent-A-Car – the employee has the latitude to sit, stand , and walk. Any lifting is negligible, and there would be no climbing, crawling, or squatting involved.

The retroactive survey that Mr. Sanders prepared for September and October 1999 indicates that the following employers were hiring during that time period:

1. Budget Rent-A-Car hired for a customer service representative with entry wages of $6.50 per hour;
2. Days Inn hired for a night auditor during September, 1999 with entry wages of $5.75 per hour for a night auditor;
3. Coastal Energy hired fuel booth cashiers with entry wages of $5.25 per hour; and
4. Both Days Inn and King's Inn hired desk clerks during this period.

As of November 5, 2001, the following positions were also identified as both suitable and available:

1. Republic Parking is hiring for a cab starter/transportation dispatcher with wages of $6.00 per hour;
2. Coastal Energy is hiring for a fuel booth cashier with entry wages of $6.15 per hour; and
3. Munro Petroleum is accepting applications for full and part-time cashiers with entry wages of $6.50 per hour.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses', and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applied the principle, enunciated in Director, OWCP v. Maher Terminals, Inc., 115 S. Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates section 556(d) of the Administrative Procedures Act. See Director, OWCP v. Greenwich

Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 221 (1994).

In the present case, Respondent does not dispute that Claimant sustained a work-related injury at its facility. *See* CTX-1. Therefore, this Court will consider only the nature and extent of disability that resulted from this work-related injury.

I. NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. See Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, fn. 5, (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. See Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); See Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, Claimant suffered an injury to his back, which required surgery. *See* CTX-1; CX-10. Dr. Terry Smith, the neurologist who operated on Claimant, opined that Claimant had reached maximum medical improvement with his back injury as of September 28, 1999. *See* CX-10, pp. 5-11. Since Dr. Smith actually performed the lumbar microdiscectomy and evaluated Claimant

on several occasions during the healing period, this Court finds that he is in the best position to determine the nature of Claimant's disability. Therefore, Claimant's disability became permanent on September 28, 1999. Prior to that time, his disability was temporary in nature.

The extent of disability can be either partial or total. Total disability is a complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. See Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

At this initial stage, the claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. See Elliot v. C & P Tel. Co., 16 BRBS 89 (1984); Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). The claimant'smedical restrictions must be compared with the specific requirements of his usual employment. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988); Mills v. Marine Repair Serv., 21 BRBS 115, *on recon.*, 22 BRBS 335 (1988); Carroll v. Hanover Bridge Marine, 17 BRBS 176 (1985); Bell v. Volpe/Head Constr. Co., 11 BRBS 377 (1979).

In this case, Claimant has sustained his initial burden of proving total disability. Claimant was injured on November 10, 1998. *See* CTX-1. He immediately reported to Respondent's hospital on site, and was taken off of work until November 15, 1998. *See* TR. pp. 29-32; RX-10. He returned to work, but experienced severe pain. Claimant was taken off of work again by his doctors on December 8, 1998 when an MRI indicated a multi-level lumbar stenosis and a herniated disc at L3-4 on the left. *See* CX-10; RX-20. After conservative treatment was unsuccessful, he underwent surgery to correct this condition on April 12, 1999. *See* CX-10. Since Claimant was taken off work during this period for both conservative

and surgical treatment, this Court finds that he was unable to return to his former position, and was thus, totally disabled from December 8, 1998 until the date of his back surgery, April 12, 1999. He is entitled to temporary total disability compensation for this period.

After Claimant underwent the surgery, both Drs. Smith and Broussard, his treating physicians, determined that he was no longer capable of doing his *pre-injury* employment position. *See* RX-16, p. 11; RX-18. Additionally, Dr. Smith assigned permanent work restrictions, which required lighter job activities than Claimant had previously engaged in. *See* RX-16; RX-25. Based on both of these medical opinions, this Court finds that Claimant could not work at his original position in Respondent's sheet metal facility, and was totally disabled from the date of his surgery and continuing. He is entitled to temporary total disability compensation from the date of his surgery to September 28, 1999, the date of maximum medical improvement. After September 28, 1999 and

continuing, he is entitled to permanent total disability compensation.

After a claimant meets his initial showing of total disability, the burden shifts to the employer to show suitable alternative employment. Total disability and loss of wage earning capacity become partial on the earliest date that the employer establishes this type of employment. See Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, physical restrictions, and that he could secure if he diligently tried. See New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). Additionally, if the claimant is offered a job at his pre-injury wages as part of his employer's rehabilitation program, there is no lost wage-earning capacity and the claimant is not disabled. Swain v. Bath Iron Works Corp., 17 BRBS 145, 147 (1985).

If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Respondent presented credible evidence that it offered, and Claimant accepted, a modified position in its facility. *See* TR. pp. 30-35. The job was offered as part of Respondent's rehabilitation program and paid pre-injury wages. *See* RX-23. The modified position required Claimant to work in the sheet metal facility, but he worked with insulation, instead of sheet metal. *See* TR. pp. 30-35. Dr. Terry Smith, Claimant's treating physician for the back injury, approved this position for Claimant, because it was completely within the permanent restrictions that he assigned to Claimant. *See* CX-9.

Additionally, neither party contests that this position remained available to Claimant. Respondent presented evidence in Mr. Walker's testimony that the position was made available to Claimant as part of its own rehabilitation program. *See* RX-23. He was placed in this position once he was released to work on October 4, 1999 by Dr. Smith. *See* Id. Therefore, this Court finds that Respondent sufficiently established that suitable employment was available for Claimant at its facility after he recovered from his back surgery.

Claimant alleges that this modified position was not suitable for him, because he suffered progressively worsening pain at work, necessitating a mandatory medical retirement. He testified that he suffered an immediate onset of back and hip pain when he returned to work on October 5, 1999. *See* TR. pp. 30-35. He quit work on October 19, 1999, because of this alleged pain. *See* Id. During these three weeks of work, he stated that he had to take all of his vacation time in order to be able to cope with the pain. *See* TR. pp. 35-39. Claimant added that his physicians authorized a mandatory retirement based on his condition. *See* TR. pp. 39-46. After examining the relevant evidence, this Court finds that these statements are not consistent with either the information he relayed to his

vocational counselor or the medical records and testimony regarding Claimant's condition.

First, Mr. Walker, the vocational rehabilitation counselor, testified that he personally communicated with several supervisors and co-workers regarding Claimant's condition. *See* RX-23. From these interviews, he ascertained that Claimant had not missed any work, nor had he complained to anyone about back or hip pain. *See* Id. In fact, the reviews that Mr. Walker received were that Claimant ambulated normally, given his pre-existing knee condition, and his job performance was satisfactory. *See* Id.

Additionally, the medical evidence indicates that there was nothing objectively wrong with Claimant. Dr. Smith testified that the back surgery was completely successful and that the x-rays revealed nothing wrong with the back area. *See* CX-10, pp. 5-12. He referred Claimant to Dr. Seidensticker for the hip pain. *See* Id. Dr. Seidensticker examined Claimant and reported no degenerative joint conditions. *See* RX-17. After reviewing Dr. Seidensticker's notes and his own records of Claimant's back surgery, Dr. Smith opined that Claimant probably did not want to do that particular job. *See* CX-10. This is a likely scenario, especially given Claimant's statements to Mr. Walker indicating that he had applied for a transfer and training to a desk job. *See* RX-23. In the short period that he returned to work for Respondent, while Claimant may have experienced some pain in his modified position, his statements regarding the position are not sufficiently corroborated by the medical and vocational evidence. In fact the vocational and medical evidence both affirmatively show that this position was suitable for Claimant.

Claimant also alleges that he is disabled and unable to work, because he was advised to retire for medical reasons. *See* TR. pp. 39-46. Both Drs. Smith and Broussard reported that they did advise a medical retirement while Claimant was working for Respondent in a modified position. *See* CX-4; CX-10. However, both doctors also indicate, in either a report or testimony, that Claimant was the one who requested a medical retirement. *See* Id. Dr. Broussard noted in his records that Claimant requested a medical retirement as early as December 23, 1998, several months before he even started working again. *See* CX-4, p. 8. Dr. Broussard eventually recommended a medical retirement in October, 1999.

Dr. Smith also testified repeatedly that Claimant was the one who wanted to retire after his back surgery. *See* CX-10. In fact, it was his impression that Claimant, "elected not to continue in the position." *See* CX-10, p. 10. While he did eventually recommend retirement, Dr. Smith based his recommendation primarily on Claimant's advanced age. *See* Id. Most importantly, Dr. Smith added that Claimant's continued complaints of pain were a factor, but given the medical evidence, his complaints seemed more like an unwillingness to do the job. *See* Id.

All of this evidence leads to the conclusion that Claimant was the one requesting the medical retirement. There is evidence in Dr. Smith's testimony that Claimant's pain complaints could not be substantiated, and that he just wanted to quit the position. Given that Claimant only worked for two or three weeks in the new position, and the fact that he requested retirement prior to beginning work,

this Court finds it more likely that Claimant simply decided that he did not want to work in that particular position anymore. However, electing not to work in a position is insufficient to render it unsuitable employment. As such, Claimant has not met his burden of proving that the position was unsuitable, or that he could not perform the required job duties.

Since the modified position provided by Respondent paid Claimant his pre-injury wages, this Court finds that Claimant suffered no loss of wage earning capacity after he began work on October 5, 1999. Therefore he is not entitled to any disability benefits after that date.

II. MEDICAL EXPENSES

Section 7(a) of the Act provides that:

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); See Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980).

An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; See also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curium), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); See McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); See Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983). The Fourth Circuit has reversed a holding by the Board that a request to the employer before seeking treatment is necessary only where the claimant is seeking reimbursement for medical expenses already paid. The court held that the prior request requirement applies at all times. See Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g, 6 BRBS 550 (1977).

In this case, it is undisputed that Claimant did sustain a work-related injury to his back from

a fall at work. *See* CTX-1. This Court also found that Claimant is permanently disabled from this work-related accident. Therefore, he is entitled to reasonable and necessary past and future compensable medical treatment associated the work-related injury.

Respondent alleges that Claimant's expenses from Dr. Broussard are unauthorized medical expenses, and that it should not have to pay for Dr. Broussard's treatments after October, 1999. This Court finds Respondent's claims to be without merit. First, Dr. Broussard is a general practitioner. His treatments were initially authorized and paid for by Respondent. Once Dr. Broussard ascertained that Claimant sustained a back injury, he referred Claimant to Dr. Terry Smith, a specialist. *See* CX-4, pp. 8-16. All of these expenses were admittedly authorized by Respondent. Once Claimant reached maximum medical improvement as to the surgical procedure, it is reasonable that Dr. Smith would release Claimant back to the general practitioner for monitoring of his pain levels in his lower back. Therefore, the chain of authorization is not broken, and Claimant is entitled to reasonable and necessary past *and* future medical expenses associated with his work-related injury to his lower back.

III. RESPONDENT'S CREDIT FOR COMPENSATION

Given that this Court awarded Claimant no additional compensation benefits above the amount already paid by Respondent, it is not necessary to consider any entitlement to a credit.

IV. SECTION 8(F) SPECIAL FUND RELIEF

Respondent also submitted a petition for Section 8(F) Special Fund Relief in the event this Court awarded permanent disability benefits above those amounts outlined in the joint stipulations. *See* RX-10. Since this Court did not make an additional award of permanent disability benefits, Respondent is not entitled to relief under this provision.

Accordingly,

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

1) Claimant, Bill Ezell, is entitled to payment of all reasonable and necessary medical benefits, including past services and medications provided by Dr. Broussard, that are related to his lower back injury; and

2) Claimant is entitled to no additional permanent disability benefits, because Respondent provided
him with suitable alternative employment at his pre-injury wages.

3) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully

supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

A

RICHARD D. MILLS
Administrative Law Judge

RDM/sls